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In the Supreme Court of the United States

October Term, 1973
No. 1765

SYLVIA MEEK, BERTHA G. MYERS, CHARLES A. WEATHERLEY, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA JEWISH COMMUNITY RELATIONS COUNCIL AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
Appellants

v.

JOHN C. PITTENGER, as Secretary of Education of the Commonwealth of Pennsylvania, and GRACE M. SLOAN, as Treasurer of the Commonwealth of Pennsylvania,
Appellees

and

JOSE DIAZ and ENILDA DIAZ, His Wife et al.,
Intervening Parties Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

MOTION TO DISMISS OR AFFIRM OF APPELLEES PITTENGER AND SLOAN

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MOTION TO DISMISS OR AFFIRM OF APPELLEES PITTENGER AND SLOAN

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Pursuant to Rule 16 of the Rules of this Court, the appellees, John C. Pittenger and Grace M. Sloan move to dismiss the appeal or to affirm the judgment of the Court below on the ground that the questions upon which review is sought have been rendered so unsubstantial by the well-reasoned opinion of the District Court that no further review by this Court is necessary.

STATEMENT OF THE CASE

This appeal challenges the constitutionality of two amendments to the Public School Code of 1949, Pa. Stat. tit. 24, Sections 1-101 et seq., on the ground that these amendments violate the Establishment Clause of the First Amendment. The Public School Code embodies a comprehensive scheme for educating all children of elementary and secondary school age. The specific statutes challenged in this proceeding are Act 194 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (Supp. 1974) (hereinafter, "Act 194") and Act 195 of July 12, 1972, Pa. Stat. tit. 24, Section 9-972 (hereinafter, "Act 195").

Act 194 (Jurisdictional Statement at 108a) states that the Commonwealth will provide specific "auxiliary services" on an individual basis, to those nonpublic school children who require services beyond those available as part of a general instructional program. All the "auxiliary services" authorized by Act 194 are presently provided for public school children. Act 195 (Jurisdictional Statement at 111a) authorizes the loan to nonpublic school children of textbooks which are acceptable for use in public schools. In addition, Act 195 also authorizes the loan of such instructional equipment and materials as are useful to the education of such children and which are "presently or hereafter provided for public school children" (Jurisdictional Statement at 113a, 114a). The instructional materials and equipment must be secular, neutral and non-ideological in nature.

After a full evidentiary hearing, which detailed the manner in which these state programs operate, a three judge District Court upheld the constitutionality of Act 194. The Court also upheld the constitutionality of Act 195 with the limitation that the only equipment which could be loaned is equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, Jurisdictional Statement at 102a-103a).

ARGUMENT

This Appeal Presents No Substantial Federal Question

1. The District Court Opinion

The majority opinion of the three judge court in this case contains such an excellent analysis of all the relevant decisions of this Court in the Establishment Clause area, and the opinion so carefully applies the principles gleaned from that analysis to the Pennsylvania programs challenged in this case that the District Court's opinion makes further review by this Court of the questions raised in this case unnecessary.

In the last few years, this Court has spoken often on the scope of the Establishment Clause, especially in the area of education. All parties to this case would freely admit that with the exception of *Everson v. Board of Education*, 330 U.S. 1 (1947), all of the relevant pronouncements of this Court which bear on the questions raised in this case have been rendered within the last six years. "As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of 'entangling' precedents" *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 761 (1973). This Court's precedents, of course, are controlling. Moreover, though it is certainly this Court's first task to resolve the specific case before it, it is equally true that in deciding cases this Court has articu-

lated those principles—those "cumulative criteria"—which should govern related cases. The majority opinion of the District Court has drawn exclusively upon this Court's opinions in the Establishment Clause area in determining that the Pennsylvania programs comply with that constitutional mandate.[1]

The District Court's Opinion announces no new rule of law in the Establishment Clause area. It has

[1] This Court summarily affirmed the judgment of the United States District Court for the District of New Jersey in *Marburger v. Public Funds for Public Schools of New Jersey*, No. 73-120, 42 U.S.L.W. (U.S. June 17, 1974). The New Jersey programs invalidated in *Marburger* are readily distinguishable from the Pennsylvania programs challenged in this proceeding. The reimbursement features of the New Jersey Act are, of course, akin to the New York reimbursement proposal invalidated in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) whereas Acts 194 and 195, when read *in pari materia* with other provisions of the Public School Code, are remarkably akin to the uniform textbook loan program found constitutional in *Board of Education v. Allen*, 392 U.S. 236 (1968). As to the relative weight to be given to this Court's summary affirmances, see generally *Edelman v. Jordan*, 94 S. Ct. 1347, 1359-60 (1974).

The limited precedential value of *Marburger* is underscored by the fact that the majority in the instant case, well aware of the lower court's decision, makes no reference to it in its opinion, and the dissent refers to it only twice and in passing (Dissenting Opinion, Jurisdictional Statement at 64a, 68a).

The precedential value of *Marburger* is further dissipated by this Court's reservation of the Establishment Clause issue in *Wheeler v. Barrera*, 42 U.S.L.W. 4877 (U.S. June 10, 1974), a decision rendered one week before the summary affirmance in *Marburger*, and a case dealing with a federal aid to education program similar in many respects to the Pennsylvania statutes challenged in this appeal.

simply applied existing rules gained from a review of this Court's decisions to State programs aimed at equalizing educational services for the children of Pennsylvania. Moreover, in concluding that this Court's decisions do not render Acts 194 and 195 unconstitutional, this Court had the benefit of a record which fully presented the manner in which the State programs operate. This, of course, was essential since it assured that the District Court had a firm grasp of the functioning of these programs and their self-limiting characteristics.[2]

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2. *The Jurisdictional Statement*

Appellants' Jurisdictional Statement treats each of the four aspects of Acts 194 and 195 separately.[3] That of course, is the only manner in which to properly review

[2] "The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the court. Usually it requires a careful evaluation of the facts of the particular case. . . . A federal court does not sit to render a decision on hypothetical facts . . ." *Wheeler v. Barrera*, 42 U.S.L.W. 4877, 4885 (U.S. June 10, 1974).

[3] Although appellants make some statement about viewing the statutes as a whole, it is difficult to see what point, if any, they are attempting to make by that statement. In any event, the most surface reading of the cases cited in support of the proposition that the Acts should be viewed as a whole will indicate that they clearly stand for a directly contrary proposition. Moreover, this Court has invariably given separate treatment to distinct and separate aspects of a statute in determining whether each part of the statute complies with the Constitution. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

the distinct and separate aspects of the four state programs. It is necessary to briefly review the arguments raised in the Jurisdictional Statement in order to show how the disposition of these arguments by the District Court's opinion have rendered them unsubstantial.[4]

Auxiliary Services:

Appellant first challenges the Auxiliary Service program. They contend that that program is open ended and in doing so place chief reliance on *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Moreover, they predicate their argument on a utopian portrait of a school system wherein "Every school, as part of its normal operations, provides instructional services to below grade level students to bring them up to grade level and to assist them to perform at the grade level for their age and potential" (Jurisdictional Statement at 12). Appellants thus argue that such services are nothing more than a normal part of a school's operating budget. This argument is facially unsound. Appellants are, in effect, saying that there is no such thing as an "auxiliary" service in education. The record simply does not support such a bold assertion, nor does it support the specific assertion that the providing of individual assistance to children requiring services beyond that available in a general instructional program is part of the normal operating costs of a school. Majority Opinion, Jurisdictional Statement at 30a-35a.

Appellant argues that the Auxiliary Services program is so open ended that it would countenance the

[4] All of these arguments have previously been made to the District Court.

State furnishing teachers for the general instructional programs of the nonpublic schools. This argument—without a line of record support—is adequately dealt with in the District Court's opinion (Jurisdictional Statement at 37a). However, appellant's reliance on *Lemon v. Kurtzman,* 403 U.S. 602 (1971), as supporting their view that the Auxiliary Service program is invalid does warrant a brief rebuttal. The very essence of the *Lemon* decision was the recognition that the State could not adequately insure that parochial school teachers were not inculcating religion unless the State had a comprehensive system of surveillance which would violate the entanglement principle of the Establishment Clause:

> ". . . The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. . . .
>
> ". . . We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . ." *Id.* at 618.

Act No. 194, on the other hand, is administered by public employees only. Moreover, in the hiring of those public employees, the State is bound by the mandate of Pa. Stat. tit. 24, Section 1-108:

> "No religious or political test or qualification shall be required of any director, visitor, superintendent, teacher, or other officer, appointee, or employe in the public schools of this Commonwealth."

The surveillance requirement found necessary in *Lemon* to protect against the deliberate or unintentional inculcation of religion by teachers in the employ of religious schools is obviated entirely by the simple fact that public employees—and only public employees—administer Act 195:

> "The notion that by setting foot inside a sectarian school a professional therapist or counsellor will succumb to sectarianization of his or her professional work is not supported by any evidence" (Majority Opinion, Jurisdictional Statement at 39a.)

The District Court's Opinion has so fully and adequately dealt with the challenges raised against Act 194 as to render those challenges unsubstantial and a further review of them by this Court unnecessary.

Textbooks:

Appellants' challenge to the textbook provision of Act 195 is, of course, nothing more than an attempt to relitigate this Court's decision of six years ago in *Board of Education v. Allen,* 392 U.S. 236 (1968). That recent decision must control, as the District Court correctly concluded. Appellants' attempts to distinguish *Allen* are unavailing.

Instructional Materials:

Appellant challenges the constitutionality of the Instructional Materials provision of Act 195 because, they say, it goes beyond the permissible bounds of *Allen.* The materials countenanced by the Guidelines to Act 195 are indistinguishable from textbooks as teaching tools. Their self-policing characteristics are apparent.

This Court only recently observed in reaffirming the principles of the *Allen* decision that "a textbook's content is ascertainable . . ." *Lemon v. Kurtzman,* 403 U.S. 602, 617 (1971). The same is equally true of the instructional materials authorized to be loaned pursuant to Act 195. Majority Opinion, Jurisdictional Statement at 45a.

Instructional Equipment:

The instructional equipment which may be loaned pursuant to Act 195, limited as it is to equipment which "from its nature cannot be readily diverted to religious purposes" (Final Order, Jurisdictional Statement at 102a-103a) does not infringe upon the Establishment Clause. Moreover, the District Court's Opinion, distinguishing between such self-policing equipment and equipment which can be diverted to religious purposes, and finding the former permissible and the latter impermissible follows closley the course this Court followed in *Tilton v. Richardson,* 403 U.S. 672, 682-84 (1971).

The equipment which can now be loaned pursuant to the Act is self-policing by any reasonable standard. The examples hypotheticated by appellants (Jurisdictional Statement at 15) of the manner in which this equipment can be put to a religious use border on the fantastic. Moreover, they suggest a conscious design to violate the law which is unsupported by the record:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." *Tilton v. Richardson,* supra, 403 U.S. at 679.

The District Court properly concluded that the loan of such equipment, self-limiting in nature, does not infringe upon the Establishment Clause.

CONCLUSION

Appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the United States District Court.

Respectfully submitted,

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